Supreme Court, U.S.
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No. 95-305

In The

Supreme Court of the United States

October Term, 1995

KENNETH M. PLAISANCE,

Petitioner,

vs.

TRAVELERS INSURANCE CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN F. WYMER, III
Counsel of Record
DEBORAH R. KURZWEIL
POWELL, GOLDSTEIN, FRAZER & MURPHY
Attorneys for Respondent
16th Floor
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-6600

7519
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

I. Did the Magistrate Judge have the authority to issue a report and recommendation, subject to *de novo* review by the District Judge, on the parties' respective motions for summary judgment?

II. Did the District Court (as upheld by the Eleventh Circuit's per curiam decision) abuse its discretion in holding that Travelers timely answered Plaisance's request for admissions?

III. Was it an abuse of discretion for the District Court (as upheld by the Eleventh Circuit's per curiam decision) to deny Plaisance's motion to amend his Complaint to request a jury trial because it was untimely?

IV. Did the District Court (as upheld by the Eleventh Circuit's per curiam decision) apply the correct standard in awarding summary judgment to Travelers when it cited *Celotex Corp. v. Catrett* and its progeny?

V. Did the District Court (as upheld by the Eleventh Circuit's per curiam decision) act properly in granting summary judgment on Plaisance's various discrimination claims?

LIST OF PARTIES

Travelers Insurance Co. is a wholly owned subsidiary of Travelers Insurance Group, Inc. which is a wholly owned subsidiary of Travelers Group, Inc. Smith Barney, Inc., Shearson Lehman Brothers International Advisors Currency Fund L.P., Shearson Lehman Futures 1000 Plus, L.P., Shearson Lehman Select Advisors Futures Fund L.P., CCC Holdings, Inc. and Commercial Credit Company are affiliated companies.

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TRAVELERS INSURANCE CO.

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Travelers Insurance Co., respectfully requests that this Court deny the petition for writ of certiorari which seeks review of the Eleventh Circuit's affirmance of the judgment of the United States District Court for the Northern District of Georgia. The District Court opinion, granting summary judgment, is reported at 880 F.Supp. 798 (N.D. Ga. 1994) and is reprinted at Appendix A. The Eleventh Circuit affirmed the District Court's ruling in a per curiam opinion on May 24, 1995. That decision is reported at 56 F.3d 1391 (11th Cir. 1995). The decision is reprinted at Appendix B.

STATUTES INVOLVED

28 U.S.C. § 636(b)(1)

Rule 36 of the Federal Rules of Civil Procedure

Rule 56 of the Federal Rules of Civil Procedure

Rule 225-1(a) of the Local Rules of Practice of the United States District Court for the Northern District of Georgia

Rule 38 of the Federal Rules of Civil Procedure

42 U.S.C. § 1981

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)

The full text of these statutes is in the Appendix.

STATEMENT OF THE CASE

A. Proceedings and Dispositions Below.

Kenneth Plaisance, Petitioner herein, alleges that his former employer, Travelers Insurance Company, discriminated against him on the basis of race, African-American, in violation of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. He also alleges retaliation in violation of Title VII. R.1-1.[1]

In December, 1992, Plaisance filed suit in United States District Court for the Eastern District of Louisiana in New

1. Citations to the Record will be in this form: R. (volume number) - (document number) - (page number, if applicable).

Orleans. *Id.* Plaisance simultaneously served Travelers with written discovery in the form of requests for admissions. Travelers filed a motion to dismiss for improper venue as well as a motion for enlargement of time in which to answer Plaisance's discovery; both motions were granted by the Court. R.2-27-1.[2] By order dated May 4, 1993, the case was transferred to the Northern District of Georgia. R.1-8. The case was assigned to United States District Judge Robert H. Vining, Jr. and referred to Magistrate Judge William L. Harper.[3] Travelers timely filed its Answer on July 3, 1993 and served its discovery responses on August 4, 1993, within the time limits specified by the Local Rules of Practice of the United States District Court for the Northern District of Georgia. R.1-10; R.1-21-2.[4]

Prior to the close of discovery, Plaisance filed a motion for summary judgement based primarily on his contention that Travelers' responses to his requests for admissions were not filed within thirty (30) days of when his Complaint was filed in Louisiana, and thus, according to Plaisance, were deemed admitted. R.1-19. Travelers filed its opposition to Plaisance's motion for summary judgment, and sought sanctions. R.1-21. Magistrate Harper issued a Report in which he recommended the denial of Plaisance's motion for summary judgment, and denied

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2. The discovery, motion to dismiss, motion for enlargement of time and the order granting same are not part of the Record. Although Plaisance bases his Petition, in part, on these documents, he did not request that they be made part of the Record. Travelers, therefore, has no choice but to cite to documents in the Record that refer to these documents.

3. The document referring this case to the Magistrate is not part of the Record. However, Plaisance does refer to it in his Petition. *See* Appellant Petition, p. 3.

4. Plaintiff also failed to make these discovery responses a part of the Record.

Travelers' request for sanctions. R.2-24. Judge Vining reviewed and adopted the Magistrate's Report and Recommendation. R.2-28.

In September 1993, Plaisance filed an untimely demand for jury trial. R.1-20. The District Court denied Plaisance's demand for jury trial. R.2-24; R.2-28.

At the conclusion of discovery, Travelers filed its own motion for summary judgment. R.2-31. The Magistrate issued a Report recommending that the motion be granted. R.2-37. After Plaisance objected to the Magistrate's Report and Recommendation, Judge Vining reviewed and adopted the Report and Recommendation, and entered judgment in favor of Travelers. R.2-38; R.3-40; R.3-41. Plaisance appealed that ruling to the Eleventh Circuit Court of Appeals. R.3-42. The Eleventh Circuit affirmed the lower Court's judgment in favor of Travelers without opinion. *See* Appendix B. This Petition followed.

B. Statement of Facts.

Plaisance, an African-American, is from New Orleans, Louisiana, where he went to high school and college. Plf. Dep., p. 4.[5] In 1988, he received his law degree from Southern University in Baton Rouge, Louisiana, and is now a licensed, practicing attorney in New Orleans. Plf. Dep., pp. 4-5, 10.

In May 1989, managers of Travelers' Danvers, Massachusetts office, traveled to Southern University for the purpose of recruiting minority employees for the Danvers office. Plf. Dep., p. 26; R.2-31-Ex. A, ¶ 4. There they met, interviewed

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5. Travelers' brief is based heavily on Plaisance's deposition, taken on November 16, 1993, which will be referred to as "Plf. Dep., p. ." The sealed deposition is an exhibit to the Record.

and hired Plaisance. Plaisance had a satisfactory but brief career at Travelers, which ended in January 1991 when he resigned after accepting a job in the New Orleans City Attorney's office. Plf. Dep., pp. 10-11. In the 19 to 20 months Plaisance worked at Travelers, he was promoted twice and received four pay raises. Plf. Dep. pp. 35, 152-53; R.2-31-Ex. D, ¶ 12.

Plaisance did not like living in Massachusetts, and wanted to return to the South. Plf. Dep., pp. 87-88. In July 1990, while vacationing in Atlanta, Plaisance dropped by Travelers' Atlanta office and learned of an opening for a position known as a Litigation Technical Specialist. Plf. Dep., pp. 92-93. Among the various requirements for this position was the requirement that the person possess at least five years experience managing litigated claims. Plf. Dep.; Ex. 12; R.2-31-Ex. C, Ex. A. Plaisance, however, did not begin to meet this minimum qualification, having just four months of experience managing litigated claims. Plf. Dep., p. 101. Because Plaisance lacked the minimum qualifications for the job, he was not hired.

The Company ultimately hired Philip Krajec, also an attorney, who was better qualified than Plaisance, and who possessed the required five (5) years of experience managing litigated claims. R.2-31-Ex. B, ¶ 6.

On or about August 1, 1990, Plaisance, who had already made it clear he wanted to leave the Danvers office, mentioned to one of his supervisors in the Danvers office that he wanted to be considered for a supervisory job that was open. Although Plaisance apparently considered the opportunity to be a promotion, the job was comparable to his current job in terms of pay and benefits. While Plaisance was qualified for the job, the position was awarded to Maureen Mullins, a white female, because the Company judged her to be *better* qualified. Plf. Dep., pp. 128-129; R. 2-31-Ex. A. Furthermore, Plaisance had a law

degree which made Plaisance more valuable to the Company as a Technical Specialist. R.2-31-Ex. A.

In January 1991, while out on a medical leave from Travelers, and without notifying Travelers, Plaisance began working in the City Attorney's office for the City of New Orleans, Plaisance's hometow[illegible] Plf. Dep., pp. 141-42; 148-150.

Plaisance filed two charges of discrimination with the Equal Employment Opportunity Commission ("the EEOC"). He filed the first charge on October 30, 1990, in which he alleged that he was denied a transfer to the Atlanta office, and was denied an assignment to supervisor in the Danvers office, because of his race. Plf. Dep., pp. 128-129; Ex. 16. In his second charge, filed on December 12, 1990, he alleged retaliation based on the informal performance evaluations he received after filing his first charge of discrimination. Plf. Dep., pp.137-138; Ex. 17. However, his evaluator, Ms. Lyle, did not know about Plaisance's EEOC charges until after he resigned in January 1991, and thus, did not know of Plaisance's charge at the time she conducted the interim performance reviews which Plaisance contends were retaliatory. R.2-31-Ex. D, ¶ 11; R.2-31-Ex. A, ¶ 13. After investigating both of Plaisance's discrimination/retaliation charges, the EEOC found no cause to believe that a violation of Title VII had occurred. Plf. Dep.; Ex. 23, 24.

SUMMARY OF THE ARGUMENT

The District Judge correctly dismissed Plaisance's race discrimination case because it was based only upon Plaisance's conclusory allegations that had no factual support. Rarely could a case be more appropriate for summary adjudication than this one. In all candor, and with all due respect to Petitioner, to characterize this Petition as "frivolous" lends the Petition greater dignity than it deserves. A brief examination of Petitioner's arguments underscores their transparency.

One of Plaisance's arguments is that a Magistrate Judge does not have the authority to make a recommendation, subject to *de novo* review, on a motion for summary judgment. By misquoting 28 U.S.C. § 636(b)(1)(B), Plaisance challenges the Magistrate's authority to recommend findings of fact and law to the District Judge on motions for summary judgment. An honest reading of that provision shows that Magistrate Judges are expressly empowered with the authority to make findings of fact and recommendations on motions for summary judgment.

Plaisance also challenges the District Court's denial of his motion for summary judgment, based on his professed belief that Travelers failed to timely respond to his request for admissions pursuant to an order from the Eastern District of Louisiana. However, once the Court in Louisiana dismissed the case for lack of venue and transferred it to the United States District Court for the Northern District of Georgia, the case immediately became subject to the Local Rules of Practice for that District Court. It is not disputed that Travelers timely responded to Plaisance's discovery requests in accordance with the Local Rules.

Plaisance also questions the District Court's finding that he failed to make a timely jury demand. This issue could not be ripe for appeal since there was no trial, bench or jury.

Plaisance further challenges the District Court's decision to dismiss his case because the Court cited *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) to explain the standard for summary judgment. According to Plaisance, *Celotex* does not apply to his case because *Celotex* is not a discrimination case. Such is the quality of the issues that Plaisance raises in his Petition.

In addition to these procedural issues, Plaisance also disputes the District Court's dismissal of his retaliation claim, his constructive discharge claim, his failure-to-transfer claim, his

failure-to-promote claim, and his § 1981 claim. Plaisance failed to establish a prima facie case as to any of those claims.

All of the above considerations notwithstanding, the case is not suited for Supreme Court review because none of the various "questions" presented by Plaisance concern conflicting decisions of Courts of Appeal or involve important questions of federal law. The decision below is consistent with this Court's precedent as well as that of the Circuit Courts. There is no reason for further review by this Court.

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT DID NOT VIOLATE 28 U.S.C. § 636 OR ARTICLE III OF THE UNITED STATES CONSTITUTION BY DESIGNATING A MAGISTRATE JUDGE TO ISSUE A REPORT AND RECOMMENDATION, SUBJECT TO *DE NOVO* REVIEW, ON THE PARTIES' RESPECTIVE SUMMARY JUDGMENT MOTIONS.

Plaisance alleges that a Magistrate Judge does not have authority to entertain motions for summary judgment. As the Seventh Circuit recently commented in evaluating a contention that was equally frivolous, this is a contention the Court "need not ponder long before disposing of this argument." *Hutchison v. Amateur Electric Supply*, 42 F.3d 1037, 1043 (7th Cir. 1994).

Plaisance's argument is based upon a seriously flawed reading (and quoting) of 28 U.S.C. § 636(b)(1)(B).[6] Plaisance is correct that subsection A of § 636(b)(1) permits a judge to

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6. The text of 28 U.S.C. § 636(b)(1) is reprinted at Appendix C.

designate a magistrate to hear and determine any pretrial matter pending before the court, except for motions for summary judgment. 28 U.S.C. § 636(b)(1)(A). However, subsection B permits "a judge to designate a magistrate . . . to submit to a judge of the court proposed findings for fact and recommendations for the disposition . . . of any motion *excepted in subparagraph A* . . ." 28 U.S.C. § 636(b)(1)(B) (emphasis added). Thus, subsection B specifically provides that Magistrates can assist in the resolution of summary judgment motions by issuing a report and recommendation to the District Judge. *Id.* The Article III judge then reviews the report and recommendation and issues its own order, either adopting or rejecting the Magistrate's recommendation. 28 U.S.C. § 636(b)(1)(C).

Here, the Magistrate Judge issued a Report and Recommendation to the District Judge on both of the motions for summary judgment filed in this case. R.2-24; R.2-37. Judge Vining, a duly appointed Article III judge, reviewed them and entered an order adopting the Magistrate's Report and Recommendation (R.2-28; R.3-40) in both instances in accordance with 28 U.S.C. § 636(b)(1)(C). Thus, Plaisance's argument that the Magistrate was not authorized to issue his Report and Recommendation is contrary to the plain reading of the law and deserves no further discussion.

II.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT TRAVELERS WAS TIMELY IN ITS RESPONSE TO PLAISANCE'S DISCOVERY REQUEST AND PROPERLY DENIED HIS MOTION FOR SUMMARY JUDGMENT.

Normally, rulings on discovery matters are left to the sound discretion of the trial courts and are subject to review only on an

"abuse of discretion" standard. *Patterson v. U.S. Postal Service*, 901 F.2d 927 (11th Cir. 1990). Here, as with Petitioner's other contentions, Petitioner's contention requires a response only because it is before the Supreme Court. Plaisance's argument is based on a request for admissions he served on Travelers before the case was transferred from Louisiana to Georgia. *See*, Petition pp. 8-15. Ignoring the Louisiana Court's enlargement of the time to respond, and ignoring the Local Rules of the Northern District of Georgia, Plaisance filed a motion for summary judgment based on a bizarre theory that Travelers admitted his request for admissions by not answering within forty-five (45) days after the lawsuit was filed when the case was pending in the Eastern District of Louisiana.[7] R.1-19. Plaisance is correct in his recitation of the general rule that a request for admission is deemed admitted if the party to whom the request is directed does not respond with a written answer or objection within 30 (or 45 days after service of the Complaint[8]) days. Fed. R. Civ. P. 36(a). However, Plaisance ignores the fact that the United States Magistrate Judge for the United States District Court of the Eastern District of Louisiana, extended the time for answering discovery until 30 days after he ruled on Defendant's Motion to Dismiss, that Plaisance's case was in fact *dismissed* for improper venue and that Plaisance's case was transferred to the United States District Court For the Northern District of Georgia, Atlanta Division. R.1-8; R.1-21. After the Louisiana Court dismissed his case, it no longer had jurisdiction.

Upon transfer, the case was then governed by the Local Rules of Practice of the United States District Court of the

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7. Even if Travelers had not been timely in responding to Plaisance's request for admissions, those admissions would not prove as a matter of law that Plaisance was discriminated against because of his race. *See*, R1-21-8.

8. Rule 36 of the Federal Rules of Civil Procedure was amended after the events at issue occurred.

Northern District of Georgia. Under Local Rule 225-1(a), discovery may not commence until 30 days *after* the appearance of the first defendant by answer to the Complaint. Thirty days after transfer, and in accordance with the Local Rules, Travelers timely answered the Complaint, and 30 days after that, Travelers answered Plaisance's discovery requests, including the request for admissions. How the District Court could have "abused its discretion" in concluding that Travelers had, under the Local Rules, timely responded to Plaisance's discovery is not clear from the Petition, nor could any rational analysis yield such a conclusion. This argument merits no further discussion.

III.

PLAISANCE'S JURY TRIAL APPEAL IS NOT PROPERLY BEFORE THIS COURT.

Plaisance's claim was resolved under Rule 56; thus, the issue of jury versus bench trial is not appropriate for appeal with the case in its current posture. Even if it was appropriate for appeal, the District Court properly denied Plaisance's request. Plaisance failed to file his request within the ten days required by the Rules. Fed. R. Civ. P. 38(b).

IV.

THE DISTRICT COURT APPLIED THE CORRECT STANDARD IN AWARDING SUMMARY JUDGMENT TO TRAVELERS.

Plaisance, a practicing attorney, argues that reliance on the standard for summary judgment as outlined in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), *United States v. Diebold, Inc.*, 369

U.S. 654 (1962) is misplaced because these cases do not involve employment discrimination. Such an argument is ridiculous; this Court and others have often cited the so-called "summary judgment trilogy" in ruling on employment discrimination cases. *See, e.g., Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989); *Crady v. Liberty National Bank and Trust Co. of India*, 993 F.2d 132 (7th Cir. 1993); *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992); *Bay v. Times Mirror Magazines, Inc.*, 936 F.2d 112 (2nd Cir. 1991); *Earley v. Champion Intern. Corp.*, 907 F.2d 1077 (11th Cir. 1990). Plaisance's argument on this issue goes beyond "frivolous."

V.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAISANCE'S CLAIMS.

A. The Retaliation Claim Was Properly Dismissed.

In order to establish a prima facie case of retaliation, Plaisance must establish: (1) a statutorily protected participation; (2) an adverse employment action occurred simultaneous with or subsequent to the protected activity; and (3) a causal link between the participation and the adverse employment action. *Hairston v. Gainsville Sun Publishing Co.*, 9 F.3d 913 (11th Cir. 1993); *Whatley v. M.A.R.T.A.*, 632 F.2d 1325, 1328 (5th Cir. 1980). The entirety of Plaisance's grounds for alleging retaliation are based on his belief that he received a negative performance evaluation from Ms. Lyle after he filed his first EEOC charge of discrimination. While it is undisputed that Plaisance participated in protected activity — he filed an EEOC charge of discrimination — he can not establish the second or third elements of a retaliation claim.

Plaisance did not establish that he was subjected to an adverse employment action. At Travelers, employees are

evaluated annually. Plaisance's last evaluation had been in April 1990. R.1-31-Ex. D, ¶ 6. Between annual evaluations, employees are informally updated about their performance. Travelers calls this an "open performance evaluation." These reviews do not affect an employee's performance rating, rate of pay, or any other term or condition of employment, and nothing adverse resulted from Ms. Lyle's discussions with Plaisance. *Id.* at ¶ 5. Plaisance admits that this review had absolutely no effect upon his employment and compensation. Plf. Dep., pp. 138-39. Thus, a materially adverse employment action is not present in this case. *Crady*, 993 F.2d 132.

In order to establish the third element, a causal link, Plaisance must, as the very least, show knowledge on Travelers' part of the protected conduct. *Hairston*, 9 F.3d at 920. Here, the alleged retaliator, Sue Lyle, had no knowledge of Plaisance's EEOC charge until after he resigned and began working for another employer. R.1-31-Ex. D, ¶ 11. Plaisance offered no evidence to refute Ms. Lyle's sworn statement; instead, he acknowledged that she may not have been aware of his EEOC charge. Plf. Dep., pp. 138, 173.

Because Plaisance did not suffer an adverse employment action and because his supervisor did not know about his charge of discrimination, summary judgment was proper as to his retaliation claim.

B. The District Court Properly Dismissed Plaisance's Constructive Discharge Claim.

Plaisance's two EEOC charges make no reference to an alleged constructive discharge. Neither does he allege in his Complaint that he was constructively discharged. He formally raised the issue for the first time in his objections to the Magistrate's Report recommending the dismissal of his claim.

R.2-38. Plaisance now asserts that his resignation after he started a new job back in New Orleans was really a "forced resignation." However, such a claim is barred because Plaisance failed to allege it before the EEOC and/or for failing to allege it in his Complaint. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970) (the scope of the judicial complaint is limited to the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination.) Because there was no constructive discharge allegation in Plaisance's EEOC Charge which could have been investigated by the EEOC, it is not properly within the scope of the Complaint. *Sanchez*, 431 F.2d at 466; *Smith v. Sentry Ins. Co.*, 45 Fair Emp. Prac. Cas. (BNA) 716, 723 (N.D. Ga. 1987). Neither did Plaisance make such an allegation in his Complaint or seek to amend his Complaint to alleged constructive discharge. The District Court properly dismissed Plaisance's belated suggestion of constructive discharge.

C. Plaisance's Failure-To-Transfer And Failure-To-Promote Claims Were Properly Dismissed.

Plaisance's transfer claim is based on the fact that he was not selected for the position of Litigation Technical Specialist in Atlanta. Yet it was undisputed in the record that Plaisance did not meet the minimum qualifications for the job.[9] Since one of the elements necessary to establish a prima facie case of discrimination is to show that the plaintiff was qualified for the position sought, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), Plaisance's claim was properly dismissed because he did not establish a prima facie case.

Unlike the Litigation Technical Specialist job in Atlanta,

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9. The job required at least five years past experience managing litigated claims; Plaisance's total experience consisted of four months. Plf. Dep.; Ex. 12; R.1-31-Ex. C, ¶ 11.

Plaisance was minimally qualified for the supervisory job he applied for in Massachusetts. The person who received the promotion, however, was considered to be better qualified for the job. R.1-31-Ex. A, ¶9. Being African-American and being minimally qualified for a job is insufficient, without more, to create a reasonable inference of race discrimination. *Pace v. Southern Ry. System*, 701 F.2d 1383, 1391 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983) ("A plaintiff, when faced with a motion for summary judgment, cannot rely on attenuated possibilities that a jury would infer a discriminatory motive, but rather must come forward with sufficient evidence to establish a prima facie case and respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact."). Plaisance produced no such evidence and does not even know the qualifications of the person who was promoted. Plf. Dep., pp. 132-33.

Moreover, Travelers' articulated legitimate, non-discriminatory reasons for selecting Ms. Mullins. *See* Brief in Support of Defendant's Motion For Summary Judgment, R.1-31-25-28. Petitioner proffered no evidence of pretext; instead, Plaisance's argument seems to be "I was better qualified because I say I was better qualified." Of course, that is not the law; a plaintiff's subjective assessment of his own performance/ qualifications is insufficient to defeat a well-supported motion for summary judgment. *Mitchell v. Toledo Hospital*, 964 F.2d at 585 (a plaintiff's denial of defendant's articulated reason without producing substantiation for the denial is insufficient to avoid summary judgment.) *Harding v. Gray*, 63 Fair Emp. Prac. Cas. (BNA) 475 (D.C. Cir. 1993) (allegations of superior qualifications must be supported with facts in the record; "a mere unsubstantiated allegation of superior qualifications creates no 'genuine issue of fact' and will not withstand summary judgment.") *Carter v. Miami*, 870 F.2d 578, 585 (11th Cir. 1989) ("Conclusory allegations of discrimination, without more, are

not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered . . . extensive evidence of legitimate, non-discriminatory reasons for its actions." (alteration in original) (citations omitted)).

D. Plaisance's Claims Are Not Actionable Under 42 U.S.C. § 1981.

Plaisance's employment with Travelers ended before November 21, 1991,[10] the effective date of the Civil Rights Act of 1991 ("CRA 1991"). Plaisance makes no allegation that any adverse conduct on the part of Travelers occurred after November 21, 1991. In light of these facts, Plaisance's § 1981[11] claim is dismissible as a matter of law because, contrary to Plaisance's belief, this Court has expressly held that the CRA 1991 is *not* retroactive as to pre-CRA 1991 conduct:

> Even when congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective amendment" must clearly appear. We cannot say that such an intent clearly appears with respect to § 101. For this reason, and because it creates liabilities that had no legal existence before the Act was passed, § 101 does not apply to pre-enactment *conduct*.

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10. Plaisance resigned in January 1991. Plf. Dep.; Ex. 21.

11. Among other things, § 101 of the Civil Rights Act of 1991 enlarged the range of behavior subject to § 1981 to include the "performance, modification, and termination" of contracts. 42 U.S.C. § 1981(b).

Rivers v. Roadway Express, Inc., 114 S. Ct. 1510, 1519-1520 (1994) (emphasis added).

Prior to the enactment of CRA 1991, the applicability of 42 U.S.C. § 1981 was governed by *Patterson v. McLean Credit Union*, 491 U.S. 164. In *Patterson*, the Supreme Court significantly limited the applicability of 42 U.S.C. § 1981 to employment discrimination cases. The Court reasoned that "post-formation" conduct, conduct after the employee has been hired, is not actionable under § 1981: "[r]ather such conduct is actionable under the more expansive reach of Title VII of the Civil Rights Act of 1964." *Patterson* at 2374. Instead, § 1981 covers only alleged discriminatory conduct which occurs at the initial formation of the contract; after initial formation, Title VII applies. Plaisance's allegations describe only the kinds of "post formation . . . incidents relating to the conditions of employment" that were not actionable under § 1981 until *after* the passage of CRA 1991. *Id.* Hence, the District Court's grant of summary judgment based on the inapplicability of § 1981 was correct. Moreover, based on the District Court's ruling on the merits of Plaisance's Title VII discrimination claim, his § 1981 claim would have been likewise dismissed on the same grounds.

CONCLUSION

To say that summary judgment in this case was appropriate is an understatement. The Eleventh Circuit's affirmance of the District Court's decision is not in conflict with that of other Circuits, nor do the issues at hand involve important questions of federal law that should be settled by this Court. This case is a straightforward employment discrimination lawsuit, one which was dismissed because it is devoid of factual support. The resources of the Court should not be wasted on this case. Plaintiff's Petition should be denied.

Respectfully submitted,

John F. Wymer, III
Counsel of Record
Deborah R. Kurzweil
POWELL, GOLDSTEIN, FRAZER
& MURPHY
Attorneys for Respondent
Sixteenth Floor
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-6600

APPENDIX A — MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND ORDER OF THE UNITED STATES DISTRICT COURT, N.D. GEORGIA, ATLANTA DIVISION DATED MAY 20, 1994

United States District Court,
N.D. Georgia,
Atlanta Division

Kenneth M. PLAISANCE,

Plaintiff,

v.

TRAVELERS INSURANCE COMPANY,

Defendant.

Civ. A. No. 1:93-cv-1021-RLV.

May 20, 1994.

* * *

Plaintiff appeared pro se.

John F. Wymer, Powell, Goldstein, Frazer & Murphy, Atlanta GA, for defendant.

ORDER

VINING, Chief Judge.

After carefully considering the report and recommendation of the magistrate judge, the court hereby adopts it as the opinion

and order of this court. This court notes that the magistrate judge's conclusion that the 1991 amendments to the Civil Rights Act are not retroactive has been confirmed by the United States Supreme Court. *See Landgraf v. USI Film Products*, __ U.S. __, 114 S.Ct. 1522, 128 L.Ed.2d 229 (1994); *Rivers v. Davison*, __ U.S. __, 114 S.Ct. 1483, 128 L.Ed.2d 229 (April 26, 1994).

SO ORDERED.

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

HARPER, United States Magistrate Judge.

Presently before the undersigned Magistrate Judge is defendant's motion for summary judgment filed January 20, 1994. (Docket No. 31). In a letter dated January 24,1994, the Clerk of Court notified plaintiff of the filing of this motion, of his duty to respond, and of the possible consequences of a failure to respond. Plaintiff has in fact filed a written response to defendant's motion. (Docket No. 36). Based upon these facts, the undersigned Magistrate Judge finds that defendant's motion for summary judgment is now ripe for review.

Under the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Everett v. Napper*, 833 F.2d 1507,1510 (11th Cir.1987). On summary judgment, the parties must satisfy the following burdens of proof:

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The party moving for summary judgment bears the initial burden of "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). An issue of fact is "material" if it is a legal element of the claim, as identified by the substantive law governing the case, such that its presence or absence might affect the outcome of the suit. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

Once the moving party meets this initial burden, summary judgment is then appropriate as a matter of law against the nonmoving party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552. In making a sufficient showing, the nonmoving party must "go

> beyond the pleadings and by . . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324, 106 S.Ct. at 2553 (quoting Fed.R.Civ.P. 56(e). In opposing summary judgment, the nonmoving party may avail itself of all facts and justifiable inferences in the record taken as a whole. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513. Instead, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970)). If, so viewed, a rational trier of fact could find a verdict for the nonmoving party under the substantive evidential standard, the nonmoving party can defeat summary judgment. *Id.* 477 U.S. at 252, 106 S.Ct. at 2512.

Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998-9 (11th Cir.1992).

It should be noted that conclusory allegations based on mere subjective beliefs do not create a genuine issue of material fact.

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Carter v. Miami, 870 F.2d 578, 585 (11th Cir.1989); *Ramsey v. Leath*, 706 F.2d 1166, 1170 (11th Cir.1983). *See also, Earley v. Champion International Corp.*, 907 F.2d 1077, 1081 (11th Cir.1990) (collecting cases). Specifically, in regards to plaintiff's claim under Title VII of the Civil Rights Act of 1964, it is well established that a Title VII plaintiff opposing a motion for summary judgment must present significantly probative evidence on the issue of discrimination to avoid summary judgment. *Young v. General Foods Corp.*, 840 F.2d 825 (11th Cir. 1988), *cert. denied*, 488 U.S. 1004,109 S.Ct. 782,102 L.Ed.2d 774 (1989); *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590 (11th Cir.1987). Reliance solely upon speculation and unsubstantiated hearsay constitutes a failure to meet this burden. *See, e.g, Palucki v. Sears, Roebuck and Co.*, 879 F.2d 1568 (7th Cir. 1989) ("a party to a lawsuit cannot ward off summary judgment with an affidavit or deposition based on rumor or conjecture"); *Benson v. Vermont American Corp.*, 723 F.Supp 1439 (M.D.Ala.1988) ("inadmissible evidence offered in the form of a deposition, cannot be considered by the court"), *aff'd without opinion*, 874 F.2d 820 (11th Cir.1989); *Williams v. Housing Authority*, 709 F.Supp. 1554 (M.D.Fla.1988) ("the court cannot base direct-evidence analysis on hearsay testimony by plaintiff'), *aff'd without opinion*, 872 F.2d 3 434 (11th Cir.1989).

In light of the above standard and resolving all evidentiary conflicts in favor of plaintiff as non-movant for purposes of considering defendant's motion for summary judgment, the undersigned finds that the following is an accurate summary of the relevant facts underlying plaintiff's claims. To the extent that further facts are relevant to each of plaintiff's claims, these facts are discussed further below.

Plaintiff was initially hired by defendant into the position of claims representative trainee on May 22, 1989. After completing

his training period, plaintiff became an outside claims representative in defendant's Danvers, Massachusetts, office. Plaintiff's starting salary was $27,000.00 per year.

In December 1989, plaintiff was promoted to the position of serious bodily injury claims representative. This promotion involved an increase in salary. In April 1990, plaintiff was promoted once again, this time to the position of Technical Specialist. Once again, this promotion involved an increase in salary.

In January 1990, plaintiff informed Donald Johnson, defendant's Danvers office manager, of his desire to transfer to another office. In particular, plaintiff expressed his interest in the Atlanta office or another office in the South. Additionally, plaintiff notified defendant's Atlanta office manager, Douglas R. Granberry, of his desire to transfer to that office and requested that Granberry keep him informed regarding any openings in the Atlanta office. At the time plaintiff informed Johnson of his desire to transfer, Johnson expressed reticence to grant such a transfer based upon his desire to keep plaintiff in the Danvers office.

In July 1990, plaintiff visited defendant's Atlanta office while on vacation. Plaintiff discovered that the Atlanta office had an opening for an individual in the position of Litigation Technical Specialist. One of the requirements for the position was a minimum of five years experience in the management of claims and claims litigation.

Plaintiff asked the office receptionist about the position. The individual informed plaintiff that defendant desired to fill the position with an internal candidate. Plaintiff then informed the

receptionist that he was in fact an employee with defendant. The receptionist then informed plaintiff that the period for applications by internal candidates had expired; but, pursuant to company policy, he could still submit his application and be considered along with the external candidates.

Plaintiff applied for the position. Despite concerns about plaintiff's apparent lack of experience, Granberry interviewed plaintiff for the position on July 3, 1990. During the course of this interview, information provided by plaintiff confirmed the fact that he lacked the five year experience requirement. The Atlanta position was eventually awarded to an external candidate, Phillip Krajec, a white male.

Plaintiff subsequently applied for a supervisor position in the Danvers office. Maureen Mullins, a white female, was eventually selected for this position.

In April 1990, plaintiff received a formal annual performance review in which he rated as at least an average performer. After Susan Lyle became plaintiff's direct supervisor in July 1990, plaintiff received two additional performance reviews. In September 1990, plaintiff was noted as still performing in at least a satisfactory manner. In November 1990, some deficiencies were noted in plaintiff's performance. These two informal reviews of plaintiff's performance, however, had absolutely no effect on plaintiff's pay, benefits, or employment status.

On October 30, 1990, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter EEOC) alleging that he was denied both the Atlanta position and the Danvers supervisor position

based upon his race (African American). On December 12, 1990, plaintiff filed a second charge of discrimination with the EEOC alleging that his poor November 1990 performance review was in retaliation for his earlier filed EEOC charge.

In December 1990, plaintiff suffered injuries in an automobile accident and subsequently was absent from work with defendant. On January 29, 1991, plaintiff began work with the New Orleans City Attorney's Office in New Orleans, Louisiana. Shortly thereafter, plaintiff notified defendant of his resignation of employment.

Mention should be made of at least one other event relevant to plaintiff's claims. Following his 1989 graduation from Southern University Law School in Louisiana, plaintiff unsuccessfully sat for the Louisiana State Bar Exam. Plaintiff, however, passed this examination on his second attempt after beginning his employment with defendant. In recognition of plaintiff's achievement, the Danvers office had a small celebration. During the course of this office party, Johnson stated that despite plaintiff's accomplishment, he was "still a coon ass."[1]

After exhausting his administrative remedies, plaintiff filed a complaint in the United States District Court for the Eastern District of Louisiana on December 18, 1992, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 1981a; 42 U.S.C. § 1981; 42 U.S.C. § 1983; and the Fourteenth Amendment to the United States Constitution. In his complaint,

1. Apparently, the term "coon ass" is generally considered a perjorative reference to any individual of Cajun background. The use of this term in the context of the present case is discussed further below.

plaintiff alleges the same facts contained within his EEOC charges of discrimination. Additionally, plaintiff alleges that he was forced to work "in a place" and "under conditions" of bias and prejudice among his co-workers and supervisors. Plaintiff further alleges that he was treated differently than similarly situated non-African American employees, particularly with regard to transfers, promotions, and job assignments. Finally, plaintiff alleges that he received pay which was far below the market average for insurance claims representatives and less than similarly situated white employees.

On May 13, 1993, plaintiff's employment discrimination action was transferred to the United States District Court for the Northern District of Georgia. This court now considers defendant's motion for summary judgment. For purposes of clarity, each of plaintiff's claims is discussed separately below.

TITLE VII

As noted above, plaintiff's complaint raises a number of discrimination claims not contained in either of his EEOC charges of discrimination. Additionally, plaintiff appears to raise through his deposition testimony and his response to defendant's motion for summary judgment a claim of constructive discharge. (Deposition of Kenneth Plaisance, hereinafter Plaisance Dep., p. 144). Defendant argues that because these claims are outside of the scope of plaintiff's EEOC charges, summary judgment in favor of defendant is appropriate with regard to these claims. For the reasons set forth below, the undersigned Magistrate Judge agrees.

It is well established that before initiation of a Title VII lawsuit, a plaintiff must first file a charge alleging discrimination

with the EEOC within 180 days after the alleged discrimination occurred. *Harris v. Norfolk & W.R. Co.*, 616 F.2d 377, 379 (8th Cir.1980). A Title VII plaintiff is required to exhaust administrative remedies before filing suit. This administrative remedy prerequisite is mandatory, and may not be side-stepped by a plaintiff *East v. Romine, Inc.*, 518 F.2d 332, 335 (5th Cir.1975).

While there may be some liberality in the interpretation of administrative prerequisites since EEOC charges are usually filed by lay persons, the scope of a complaint is not to be extended beyond the scope of the "EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970). As held by the Fifth Circuit Court of Appeals in *Sanchez* held:

> The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is *not* filed as a preliminary to a lawsuit. On the contrary, the purpose of the charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. Once a charge has been filed, the Commission carries out its investigatory function and attempts to obtain voluntary compliance with the law. Only if the EEOC *fails* to achieve voluntary compliance will the matter ever become the subject of court action. . . . Within this statutory scheme, it is only logical to limit the permissible scope of the civil action to the scope of the EEOC investigation which can reasonably be

> expected to grow out of the charge of dis crimination.

Id.

Under Title VII's comprehensive administrative scheme, the EEOC "should have the first opportunity to investigate the alleged discriminatory practices to permit it to perform its role in obtaining voluntary compliance and promotion of conciliation efforts." *Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 929 (11th Cir.1983). Thus, a plaintiff must fulfill the statutory prerequisite of filing a timely charge of discrimination with the EEOC before a lawsuit can be instituted. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982): *Jackson v. Seaboard Coast Line Railroad Co.*, 678 F.2d 992 (11th Cir.1982); *Buffington v. General Time Corp.*, 677 F.Supp. 1186, 1192 (M.D.Ga.1988). "[A]n aggrieved employee may not bypass the administrative process with a direct appeal to the courts." *Buffington*, 677 F.Supp. at 1192; *Beverly v. Lone Star Lead Constr. Corp.*, 437 F.2d 1136, 1139-40 (5th Cir.1971); *Eastwood v. Victor Temporaries*, 441 F.Supp. 51, 52 (N.D.Ga. 1977).

The standard for determining whether claims omitted from the EEOC charge yet subsequently raised in a lawsuit may be maintained in the lawsuit is whether the subsequently raised claims are "reasonably related" to the original claims raised in the EEOC charge. *Sanchez*, 431 F.2d at 466; *Evans*, 696 F.2d at 929. If the subsequently raised claims do not meet this test, the district court is precluded from hearing them. *Buffington*, 677 F.Supp. at 1192; *Clements v. H. Goodman & Sons, Inc.*, 25 Fair Empl. Prac. Cas. (BNA) 511, 512-13, 1981 WL 161 (N.D.Ga.1981).

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After careful consideration, the undersigned finds that the additional claims raised by plaintiff in his complaint and his deposition are not sufficiently "reasonably related" to the claims raised in his EEOC charges to merit their consideration. Consideration of these claims on their merits would undermine the goal of voluntary reconciliation embodied by Title VII. Accordingly, the undersigned Magistrate Judge hereby RECOMMENDS that defendant's motion for summary judgment be GRANTED as it relates to any and all Title VII claims not included within plaintiff's EEOC charges of discrimination.

A Title VII plaintiff may demonstrate discriminatory intent through either direct or indirect evidence. Direct evidence consists of the actions or remarks of an employer reflecting a discriminatory attitude. *Wall v. Trust Company of Georgia,* 946 F.2d 805, 809-10 (11th Cir.1991); *Hill v. Metropolitan Atlanta Rapid Transit Authority,* 841 F.2d 1533, 1539 (11th Cir.1988), *modified,* 848 F.2d 1522 (11th Cir.1988). *See also, Bell v. Birmingham Linen Service,* 715 F.2d 1552, 1556 (11th Cir.1983), *cert. denied,* 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 344 (1984). Indirect evidence may be demonstrated through the framework established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). For example, an individual may produce indirect evidence of a discriminatory failure to hire by establishing that he is a member of a protected group and that he "applied for an available position for which [he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine,* 450 U.S. at 253,101 S.Ct. at 1094. This framework, however, is flexible, and can be shaped to fit employment practices other than failure to hire.

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If a plaintiff presents direct evidence of discrimination, the burden of proof shifts to defendant to establish that it would have reached the identical employment decision absent unlawful considerations. *See, Wall,* 946 F.2d at 1510 *(citing, Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989)).

Conversely, where the plaintiff has established a *prima facie* case of discrimination through indirect evidence a burden of production shifts to the employer "to articulate some legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp.,* 411 U.S. at 802, 93 S.Ct. at 1824. If the defendant carries this burden, the plaintiff must then prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were merely pretexts for discrimination. *Id.* at 804, 93 S.Ct. at 1825; *Wall,* 946 F.2d at 809; *Perryman v. Johnson Products Co.,* 698 F.2d 1138, 1142 (11th Cir.1983). If the trier of fact rejects defendant's proffered reason as incredible, this rejection, coupled with the elements of plaintiff's *prima facie* case, may alone support a finding of pretext. *St. Mary's Honor Center v. Hicks,* __ U.S. __, __, 113 S.Ct. 2742, 2748,125 L.Ed.2d 407 (1993).

The establishment of a *prima facie* case gives rise to a rebuttable presumption that the employer unlawfully discriminated against the plaintiff. *Burdine,* 450 U.S. at 254,101 S.Ct. at 1092; *Thompkins v. Morris Brown College,* 752 F.2d 558, 561 (11th Cir.1985). In evaluating whether a plaintiff has satisfied the initial burden of a *prima facie* case, the central inquiry is whether the circumstantial evidence presented is sufficient to create an inference, *ie.,* a rebuttable presumption, that the employer's personnel decision was based on impermissible considerations. *Furnco Construction Co. v.*

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Waters, 438 U.S. 567, 577, 98 S.Ct. 2943, 2949, 57 L.Ed.2d 957 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52 L.Ed.2d 396 (1977). *See also, Lee v. Russell County Bd. of Educ.*, 684 F.2d 769, 773-75 (11th Cir.1982), *appeal after remand*, 744 F.2d 768 (11th Cir.1984).

A. *The Atlanta Position.*

Plaintiff alleges that defendant's selection of Krajec instead of plaintiff for the Atlanta Litigation Technical Specialist position was based at least in part upon plaintiff's race in violation of Title VII. In order to establish his *prima facie* case of discrimination in promotion, plaintiff must establish: (1) he is a member of a protected class; (2) he was qualified for the position for which he applied; (3) he was rejected despite his qualifications; and (4) an equally or less qualified individual outside of his protected class was selected for the challenged promotion. *See, e.g., Wu v. Thomas*, 847 F.2d 1480, 1483 (11th Cir.1988), *cert. denied, Wu v. Bd. of Trustees*, 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 156 (1989); *Perryman v. Johnson Products, Inc.*, 698 F.2d 1138,1142 n. 7 (11th Cir.1983). For the reasons set forth below, the undersigned finds that plaintiff has failed to produce at least some evidence tending to establish each of the required elements of his *prima facie* case, and that summary judgment in favor of defendant is therefore appropriate with regard to this claim.

It is undisputed that plaintiff is a member of a protected class, that he applied for the Atlanta position, and that he was rejected for this promotion. Plaintiff, however, has failed to produce any evidence which would tend to support his claim that he was qualified for the position for which he applied. Likewise,

plaintiff has failed to produce any evidence which would tend to support his claim that Krajec was equally or less qualified for the position in question.

Plaintiff admits that one of the requirements for the Atlanta position was a minimum of five years experience in the management of claims and the litigation of claims. (Plaisance Dep., pp. 100-101, 108). It is undisputed that plaintiff failed to meet this experience requirement. (Plaisance Dep., pp. 100-101, 108; Affidavit of Douglas R. Granberry, hereinafter Granberry Aff., ¶¶ 4-5; Affidavit of Thea C. Jones, hereinafter Jones Aff., ¶¶ 10-11). Accordingly, the undersigned finds that plaintiff has failed to produce any evidence upon which a reasonable trier of fact could base a determination that plaintiff has met his burden of establishing that he was qualified for the position in question. Accordingly, as plaintiff has failed to establish his qualifications by any evidence, defendant is entitled to summary judgment on this claim. *See, Ferguson v. Veterans Administration,* 723 F.2d 871, 873 (11th Cir.1984), *cert. denied,* 469 U.S. 1072, 105 S.Ct. 563, 83 L.Ed.2d 504 (1984).

Additionally, plaintiff has failed to produce any evidence which would tend to support his allegation that Krajec was less qualified for the position. In fact, plaintiff admits that he knows nothing of Krajec's qualifications for the position in question. (Krajec's Dep., pp. 102-103). Accordingly, plaintiff has offered absolutely no evidence which would support a reasonable trier of fact's determination that Krajec was in fact equally or less qualified for the position.

The undersigned notes that in his response to defendant's motion, plaintiff makes several arguments in favor of rejecting defendant's motion. First, plaintiff challenges defendant's

decision based upon Granberry's failure to notify him of an opening in the Atlanta office so that he could apply along with the internal candidates. Plaintiff, however, admits that no formal mechanism existed for inter-office job posting with defendant. (Plaisance Dep., pp. 105-106, 118). Furthermore, plaintiff has not produced any, evidence suggesting that such information was provided to individuals outside of his protected class who were seeking similar transfers. Additionally, plaintiff has not produced any evidence which would tend to suggest that his "insider" status would somehow overcome his lack of qualifications for the position. Instead, plaintiff simply states that defendant should have had a preference for internal candidates and that this preference would support his selection over a more qualified external candidate. (Plaisance Dep., p. 107).

As noted by the Eleventh Circuit Court of Appeals in *Nix v. WLCY Radio/Rahall Communications,* 738 F.2d 1181, 1187 (11th Cir. 1984), "Title VII is not a shield against harsh treatment at the workplace." *(quoting, Jackson v. Killeen,* 654 F.2d 1181,1186 (5th Cir.1981). Instead, a claim of Title VII discrimination must fall absent direct or circumstantial evidence of discriminatory intent. *Id.* Accordingly, the undersigned finds that this argument does not support plaintiff's position.

Additionally, plaintiff suggests in his deposition that the five year experience requirement has a disparate impact on minority applicants and was perhaps set in place for that very purpose. (Plaisance's Dep., p. 109). Plaintiff's argument on this point, however, consists of nothing more than conclusory allegations and is therefore inappropriate to overcome defendant's motion for summary judgment. *Carter v. Miami, supra.* Specifically, plaintiff has failed to produce any evidence which would tend to establish that the challenged requirement results in the selection

of individuals in a "significantly discriminatory pattern." Accordingly, plaintiff has failed to establish a *prima facie* case of disparate impact discrimination. *See, Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 53 L.Ed.2d 786 (1977). Also, as plaintiff has failed to allege disparate impact discrimination in his complaint, this court should not consider such a claim at this point. *Wu,* 847 F.2d at 1484.

Finally, the undersigned notes that plaintiff has failed to produce any direct evidence of discrimination with regard to the challenged Atlanta promotion decision. Plaintiff states that the only allegedly racial comment made by defendant's agents was Johnson's "coon ass" comment made at plaintiff's office party. It is undisputed that Granberry, and not Johnson, was responsible for the selection of Krajec instead of plaintiff for the Atlanta position. (Granberry Aff., ¶ 3; Affidavit of Donald A. Johnson, hereinafter Johnson Aff., ¶ 8). As such, Johnson's statement is insufficient to establish direct evidence of discrimination. *See, e.g., Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion); *Grigsby,* 821 F.2d at 596.

For the reasons set forth above, the undersigned Magistrate Judge finds that plaintiff has failed to establish either direct or indirect evidence of discrimination under either the disparate treatment or disparate impact Title VII schemes. Accordingly, the undersigned Magistrate Judge hereby RECOMMENDS that defendant's motion for summary judgment be GRANTED as it relates to this particular claim.

B. *The Danvers Position.*

Plaintiff's challenge to his failure to obtain the Danvers

supervisor position is haunted by the same deficiency in that plaintiff has failed to produce any evidence which would tend to support his allegation that Mullins was either equally or less qualified. Instead, plaintiff once again admits that he has no knowledge or evidence with regard to Mullins' qualifications. (Plaisance's Dep., pp. 131-133, 164-165). Accordingly, the undersigned finds that plaintiff has failed to produce at least some probative evidence tending to establish each element of his *prima facie* case and has therefore failed to produce sufficient indirect evidence to allow him to survive defendant's motion for summary judgment.

Additionally, the undersigned notes that Johnson's alleged "coon ass" comment fails to establish some direct evidence of discrimination allowing plaintiff to survive defendant's motion for summary judgment.[2] First, it is not at all clear that this comment referred to plaintiff's race as an African American. (Plaisance Dep., pp. 80-81). It is clear, however, that this isolated comment is the only statement by defendant or its agents which plaintiff refers to as support for his direct evidence claim. (Plaisance Dep., pp. 83-84). Just as statements by non-decision makers are insufficient to establish direct evidence of discrimination, isolated or stray comments made by the actual decision maker but completely unrelated to the challenged employment action do not constitute direct evidence of discrimination. *See, e.g., Price Waterhouse v. Hopkins, supra.*

For the reasons set forth above, the undersigned Magistrate Judge finds that plaintiff has failed to produce evidence which would allow a reasonable trier of fact to find that plaintiff had

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2. Johnson flatly denies having made this comment. (Johnson Aff., ¶ 15). For purposes of considering the merits of defendant's motion for summary judgment, however, the undersigned assumes that this comment was made.

established discrimination through either direct or indirect evidence. Accordingly, the undersigned RECOMMENDS that defendant's motion for summary judgment be GRANTED as it relates to this claim.

C. *Retaliatory Performance Rating.*

The *McDonnell Douglas* framework for evaluating claims of Title VII discrimination has been set forth at great lengths above. Courts have established a similar three-tier framework for evaluating claims of retaliation under Title VII. Plaintiff is first required to establish a *prima facie* case of retaliation. Specifically, plaintiff must establish that (1) he has engaged in statutorily protected behavior; (2) the employer has taken an adverse employment action; and (3) a causal link exists between plaintiff's protected activity and the employer's conduct. *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1520 (11th Cir.1991); *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 600-601 (11th Cir.1986); *McCollum v. Bolger*, 794 F.2d 602 (11th Cir.1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 883, 93 L.Ed.2d 836 (1987); *Doyal v. Marsh*, 777 F.2d 1526, 1534 (11th Cir. 1985); *Hamm v. Members of Board of Regents*, 708 F.2d 647, 654 (11th Cir.1983); *Canino v. United States EEOC*, 707 F.2d 468, 471 (11th Cir.1983).

As noted above, plaintiff has clearly established that he is a member of a protected class. However, plaintiff has failed to establish any evidence tending to support the remaining two elements of his *prima facie* case. The specific deficiencies of plaintiff's evidence are discussed below.

As noted above, an essential element of plaintiff's *prima facie* case of retaliation is the establishment of some evidence

that he has been subject to an adverse employment action. This element requires at least some showing of a negative impact upon plaintiff. Such a result is clearly indicated by the Eleventh Circuit Court of Appeals' decision in *Morgan v. City of Jasper*, 959 F.2d 1542, 1547 (11th Cir.1992), in which the court restates this element as a requirement that plaintiff demonstrate he "was disadvantaged by an action of the employer simultaneously with or subject to [his protected activity]." (*Quoting, Whatley v. MARTA*, 632 F.2d 1325,1328 (5th Cir.1980)). *See also, Jordan v. Wilson*, 851 F.2d 1290, 1292-93 (11th Cir. 1988).

Defendant argues that the challenged November 1990 evaluation was simply an informal review that had no affect upon plaintiff's employment or compensation. (Affidavit of Susan Lyle, hereinafter Lyle Aff., ¶¶ 5, 9). Plaintiff states that he is unaware of any difference between formal and informal evaluations by defendant. (Plaisance Dep., p. 76). Plaintiff does admit, however, that this negative evaluation had absolutely no effect upon his employment or compensation. (Plaisance Dep., pp. 138-39). As plaintiff has failed to establish a "materially adverse change" in his employment by any probative evidence, the undersigned finds that plaintiff has failed to satisfy the adverse employment action element of his *prima facie* case. *See also, Crady v. Liberty National Bank & Trust Co. of Indiana*, 993 F.2d 132, 135 (7th Cir.1993); *Coney v. Department of Human Resources of the State of Georgia*, 787 F.Supp. 1434, 1442 (M.D.Ga.1992).

Assuming arguendo, however, that plaintiff had established the presence of an adverse employment action, plaintiff has still failed to establish any evidence which would tend to establish a causal link between his filing of two EEOC charges and his negative evaluation. It is the established precedent of this circuit

that whenever an employee alleges that an adverse employment action has been taken in reprisal for the employee engaging in protected activity, it is the burden of the employee to prove that the employer had actual knowledge of such activity. *See, EEOC v. Carolina Freight Carriers Corp.*, 723 F.Supp. 734, 748 (S.D.Fla.1989). *See also, Webster v. Department of the Army*, 911 F.2d 679, 689 (D.C.Cir.1990), *cert. denied*, 502 U.S. 861, 112 S.Ct. 181, 116 L.Ed.2d 143 (1991). Plaintiff, however, states that he does not know if Lyle was aware of his filing of the EEOC charges at the time she completed his challenged performance evaluation and that she may have in fact been unaware of his protected activity. (Plaisance Dep., pp. 138,173). The undisputed testimony of both Johnson and Lyle establish that they had no knowledge of plaintiff's EEOC charges until after he had resigned his employment. (Johnson Aff., ¶ 12; Lyle Aff., ¶ 11).

Rather than dispute this fact, plaintiff simply suggests through conclusory allegations in his deposition that Lyle was somehow directed by her supervisors to conduct the challenged evaluation. As noted above, however, such conclusory allegations are insufficient to overcome defendant's motion for summary judgment. *Carter v. Miami, supra.* Furthermore, plaintiff has produced absolutely no evidence that Lyle's supervisors were aware of his protected activity. Accordingly, this argument is of no support to plaintiff's claim.

Based upon the above facts, the undersigned Magistrate Judge finds that plaintiff has failed to produce any probative evidence tending to establish the required element of causation Accordingly, the undersigned Magistrate Judge hereby RECOMMENDS that defendant's motion for summary judgment be GRANTED as it relates to this claim. In summary, the undersigned finds that plaintiff has failed to establish evidence

supporting a *prima facie* case with regard to any of his Title VII claims. Accordingly, the undersigned RECOMMENDS that defendant's motion for summary judgment be GRANTED as it relates to each of these claims.

42 U.S.C. § 1981 AND THE CIVIL RIGHTS ACT OF 1991

A Section 1981 claim concerns discrimination in the making and enforcement of contracts. The code at 42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The United States Supreme Court imposed limitations on Section 1981 actions in *Patterson v. McLean Credit Union,* 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). In *Patterson,* the Supreme Court noted the narrow wording of Section 1981 and held that:

> Section 1981 cannot be construed as a general proscription of racial discrimination in all aspects of contract relations, for it expressly prohibits discrimination only in the making and enforcement of contracts. . . . [T]he right

> to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract has been established. . . .

Id. 491 U.S. at 176-77,109 S.Ct. at 2372-73. Accordingly, the Supreme Court denied plaintiff's racial harassment claim as outside the scope of Section 1981.

In *Patterson v. McLean Credit Union* the Supreme Court ruled that post-contract formation allegations of racially discriminatory conduct are not actionable under 42 U.S.C. § 1981, since § 1981 only guards against racial discrimination in the "making" of contracts and the right to "enforce" the contract through legal processes. *Patterson,* 491 U.S. at 176-79, 109 S.Ct. at 2372-2374. In order to state a claim cognizable under § 1981,"the plaintiff's claim must involve improper 'conduct at the initial formation of the contract' or 'conduct which impairs that right to enforce contract obligations through legal process.' " *Lavender v. V & B Transmissions & Auto Repair,* 897 F.2d 805, 807 (5th Cir.1990) (*quoting Patterson,* 491 U.S. at 179, 109 S.Ct. at 2374).

According to the *Patterson* Court, in the employment context, post-formation conduct which by its nature involved "in effect the opportunity to enter into a new contract with the employer" was actionable under 42 U.S.C. § 1981. *Patterson,* 491 U.S. at 185, 109 S.Ct. at 2377. A claim that an employer failed to promote an employee because of the employee's race is within the reach of § 1981 when the promotion "rises to the level of an opportunity for a new and distinct relation between employee and employer." *Id.*

Appendix A

As the Eleventh Circuit stated in *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1520 (11th Cir.1991):

> *Patterson's* discussion of § 1981 makes the focus of the test fairly clear: a plaintiff's failure-to-promote claim is cognizable under § 1981 if the promotion would have entailed a new contractual relationship between the employee and the employer, "involving in effect the opportunity to enter into a new contract with the employer." (Footnote omitted).

See also, Harrison v. Associates Corp. of North America, 917 F.2d 195, 198 (5th Cir. 1990).

While the Supreme Court's decision in *Patterson* may have made the focus of the test to be applied by the circuit courts clear, it has done little to guide the application of this test to specific fact situations. As noted in *Guliford v. Beech Aircraft Corp.*, 768 F.Supp. 313 (D.Kan.1991), some courts have found that virtually any change in the employment relationship will meet the "new contract" test of *Patterson* while other courts have held that "the change in the employment relationship must be a 'fundamental' one as distinguished from garden-variety or routine advancements or raises." *Guliford*, 768 F.Supp. at 318-319 (collecting cases).

It appears that the stricter interpretation of *Patterson* has been adopted by the Eleventh Circuit. In *Wall v. Trust Company of Georgia*, 946 F.2d 805 (11th Cir.1991), the court rejected plaintiff's contention that a promotion from the position of customer service representative to that of tax analyst rose to the

level of change required by *Patterson* even though there was a significant change in job duties. In *Wall*, the court noted that:

> The court stated in *Patterson* that "only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under section 1981," citing *Hishon v. King and Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (refusal of law firm to accept associate into partnership) (Title VII). 491 U.S. at 185, 109 S.Ct. at 2377. Effectively, *Patterson* held that in the promotion context, a new contract is not made for purposes of section 1981 unless such a new and distinct relationship would flow from the promotion. *Bennun u Rutgers State Univ.*, 941 F.2d 154 (3rd Cir.1991) (denying relief for nonpromotion from tenured associate professor to full professor based on application of *Patterson* test).
>
> We disagree with *Wall* that the promotion here rises above the bright line of a relation sufficiently "new and distinct" to qualify under the *Patterson* test. *See Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1519-20 (11th Cir.1991) (remanding to apply "new contract" test). The customer service representative [**8] and tax analyst positions are both nonexempt salaried jobs, are relatively equal in grade (118 versus 119), provide identical benefits and compensation,

> and are covered by the same policies and procedures.

Wall, 946 F.2d at 808.

After *Wall*, however, the specific question of whether the addition of certain supervisory duties constitutes a sufficient change in the employment relationship to trigger a § 1981 suit is not entirely resolved. One reason that the court rejected plaintiff's claim was that "the change would not have involved the elevation of Wall to a management position which would be considered a new contract, analogous to the change in status in *Hishon*, cited by means of example in *Patterson*." *Wall*, 946 F.2d at 808. In support of this proposition, the court cited two cases: *Harrison v. Associates Corp. of North America*, 917 F.2d 195 (5th Cir.1990) and *Mallory v. Booth Refrigeration Supply Co., Inc.*, 882 F.2d 908 (4th Cir.1989). Because it appears that the Eleventh Circuit Court of Appeals has determined that the bright line of *Patterson* falls somewhere between these two fact situations, a brief discussion of these decisions is instructive in the present case.

In *Mallory v. Booth*, the denial of a promotion which would have elevated plaintiff from the position of clerk to supervisor was held to create a new contractual relationship for purposes of applying § 1981. *Mallory*, 882 F.2d at 910. The court's reliance on *Harrison*, however, would seem to place severe restrictions on the general principle that the addition of supervisory duties alone constitutes a change in employment relationships significant to trigger a § 1981 suit. In *Harrison*, plaintiff was denied a promotion from CRT operator to CRT lead operator. In rejecting plaintiff's claim that this denial of promotion constituted a violation of § 1981, the court stated that while the lead operator was responsible for assigning the priority to various work and in

assisting other operators as needed, lead operators were not automatically entitled to a raise in pay and neither did they have general supervisory duties such as hiring and firing of other employees. *Harrison*, 917 F.2d at 196.

In the present case, plaintiff has produced no evidence that either the Atlanta position or the Danvers supervisor position would have afforded him "an opportunity for a new and distinct relationship" with his employer. Instead, the undersigned notes that the evidence in this case tends to establish a certain similarity between plaintiff's position as Technical Specialist and the Atlanta position of Litigation Technical Specialist. Finally, the undisputed evidence in this case establishes that the Danvers supervisor position was equivalent to plaintiff's position in both salary grade and actual compensation, and that Mullins actually had a smaller salary in the supervisor position that plaintiff had in his Technical Specialist position. (Johnson Aff., ¶ 11). Accordingly, the undersigned finds that these two claims are insufficient as a matter of law to support a 42 U.S.C. § 1981 claim. Additionally, plaintiff's retaliation claim is clearly insufficient to support a 42 U.S.C. § 1981 claim. *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527 (11th Cir.1990), *cert. denied*, 498 U.S. 943, 111 S.Ct. 353, 112 L.Ed.2d 317 (1990).

Because the undersigned finds that plaintiff's failure to promote claims and retaliation claim may not properly be brought under 42 U.S.C. § 1981 as originally enacted, defendant's motion for summary judgment on this issue should be granted unless a determination is made that the provisions of the Civil Rights Act of 1991 which enlarge the scope of Section 1981 claims should be applied retroactively to the events referred to in plaintiff's complaint, events occurring prior to the enactment of the 1991 Act.

Appendix A

The Eleventh Circuit Court of Appeals addressed the question of the potential retroactive application of the Civil Rights Act of 1991 in *Baynes v. AT & T Technologies, Inc,* 976 F.2d 1370 (11th Cir.1992). In *Baynes,* the court noted special difficulties in determining the potential retroactive application of such statutes absent clear legislative guidance. After finding that the issue of retroactivity could not be decided based upon the legislative history of the Civil Rights Act of 1991, the court stated that:

> Supreme Court precedent offers little more help than does the Act and its legislative history. The Court has so far declined to resolve the conflict in its own rules of presumptions of statutory retroactivity. *Compare Bradley v. School Board of Richmond,* 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974) (presumption of retroactivity), with *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988) (presumption of prospectiveness); *see also, Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990) (declining to resolve the "apparent tension" between the *Bradley* and *Bowen* lines of cases).

Baynes, 976 F.2d at 1372-73.

The court quickly noted that under the stricter rule of *Bowen,* the 1991 Civil Rights Act was clearly not retroactive in effect, as the cloudy legislative history was insufficient to overcome the

presumption against retroactivity. *Baynes*, 976 F.2d at 1373. The court, however, noted that historically it had adhered to the more liberal rule of interpretation contained within the *Bradley* line of cases. Ultimately, this distinction was meaningless as the court determined that even given the *Bradley* presumption of retroactivity, the Civil Rights Act of 1991 has only prospective application.

As noted by the court, the *Bradley* approach presumes retroactive application of a statute "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016. The court then continued, opining that:

> To determine whether "manifest injustice" would result, we look at three elements: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights."

Baynes, 976 F.2d at 1373 (citing *Bradley*, 416 U.S. at 717, 94 S.Ct. at 2019). After careful consideration of the nature of discrimination suits, the court held that each of these three elements argued for only prospective application of the Civil Rights Act of 1991.

As to the first element, the court noted that employment discrimination cases are inevitably private disputes between individuals and not matters of "great national concern." *Baynes*, 976 F.2d at 1374. Therefore, the court found that the first element of the *Bradley* test weighed in favor of only prospective application of the Act.

As to the second prong of the *Bradley* analysis, the court noted that the Civil Rights Act of 1991 created both remedial and substantive changes to the provisions of 42 U.S.C. § 1981. Given this fact, the court noted that "[b]ecause the Act changes substantive obligations as well as remedial or procedural rights, however, we believe the nature of the parties' rights weighs against retroactivity in this case." *Baynes*, 976 F.2d at 1375 (*citing, United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir.1985)). Specifically, the court referred to the 1991 Act's extension of the coverage of 42 U.S.C. § 1981 as a plainly substantive change. Referring to the Seventh Circuit Court of Appeals' decision in *Luddington v. Indiana Bell Telephone Co.*, 966 F.2d 225, 229 (7th Cir. 1992) (Posner, J.), the court stated that "[w]e agree with the Seventh Circuit that, however characterized, extension of Section 1981 liability mandates a substantial increase in employer's level of care that forces them to adjust their behavior in response to the statutory change." *Baynes*, 976 F.2d at 1374 (n. 5).

This concern expressed by the court spills over into its discussion of the third prong of the *Bradley* analysis. In setting forth the proper framework for analysis of this prong of the *Bradley* test, the court stated that "[t]he third *Bradley* consideration, the effect of the change in law upon the parties' rights, requires that we consider whether retroactive application of the Act unfairly imposes "a new and unanticipated obligation" on the parties." *Baynes*, 976 F.2d at 1375 (*quoting Bradley*, 416 U.S. at 720, 94 S.Ct. at 2021). Specific to the question of the retroactive application of the Civil Rights Act of 1991, the court declared that:

> Although the basic norm of non-discrimination is unchanged by the Act, we

> believe that imposing potential liability damages for post-hiring behavior under Section 1981, as opposed to the lesser Title VII remedies, would significantly and unfairly have an effect on the parties.

Baynes, 976 F.2d at 1375.

Despite the clarity of the court's decision in *Baynes*, this decision is not directly dispositive of the issue of retroactivity in the present case. In *Baynes*, judgment had been entered and an appeal was pending at the time the Civil Rights Act of 1991 became effective. In the present case, plaintiff filed his complaint approximately nine months prior to the effective date of the 1991 Act and alleged discriminatory conduct occurring prior to the adoption of the Act. However, unlike the case in *Baynes*, litigation had not been concluded prior to the effective date of the 1991 Act. In the concluding sections of its opinion, the *Baynes* court stated that:

> In addition, this case has been litigated for two and one-half years through a nonjury trial on the merits, all in reliance on prior law. In circumstances like these, we conclude that the affect of the statutory change strongly mitigates against retroactivity.
>
> For these reasons, we hold that those parts of the Civil Rights Act of 1991 in controversy in this case do not apply retroactively in cases in which Judgement was entered before the Act's pertinent effective date. Our holding is consistent with those of most of the other

> circuits that have addressed the retroactivity of the Civil Rights Act of 1991.

Baynes, 976 F.2d at 1375.

The *Baynes* court, however, did address the question of retroactivity in other types of cases in the form of a footnote. The court states that "we address no other kinds of cases, but neither do we imply that the Act would apply retroactively in other circumstances." *Baynes*, 976 F.2d at 1372 (n. 1). The question remains, therefore, whether or not the Eleventh Circuit Court of Appeals' decision in *Baynes* may be properly extended to apply to cases filed before the effective date of the 1991 Act, alleging acts of discrimination occurring prior to the 1991 Act's adoption, but remaining open at the time that the Act became law. For the reasons discussed below, the undersigned finds that the decision in *Baynes* is readily applicable in these cases.

First, the undersigned notes that the *Baynes* court's decision that retroactive application of the 1991 Act would "result in manifest injustice" rests largely on the realization that retroactive application would unfairly impact employers in denying them the right to conform their actions to the law in light of expected penalties for non-conformance. In short, retroactive application would deprive employers of the ability to adjust their conduct to differing levels of care created by the new Act. *See, Baynes*, 976 F.2d at 1374 (n. 5). These concerns would be equally applicable in any case where the challenged conduct on the part of an employer occurred prior to the enactment date of the remedial and substantive changes in discrimination law contained within the 1991 Act.

Second, the undersigned notes that the *Baynes* court cited

with approval the Seventh Circuit Court of Appeals' decision in *Luddington v. Indiana Bell Telephone Co., supra.* In *Luddington,* the court undertook a fairly exhaustive discussion of the various situations in which a statute might be applied retroactively. The court noted that:

> A statute could be applied (1) to cases filed and completed before the effective date of the statute that arise from acts committed before that effective date, (2) to cases filed before the effective date of the statute, but not completed by that date, that arise from acts committed before that date, (3) to cases filed after the effective date that arise from acts committed before that date, (4) to cases in any of these categories but in which the conduct complained of straddled the effective date of the statute, or (5) only to cases filed after the effective date that arise from acts committed entirely after that date. The first four types of application would be retroactive to varying degrees; the fifth wouldn't be retroactive at all.

Luddington, 966 F.2d at 227.

In holding that retroactive application of the 1991 Act in situations where the challenged conduct occurred prior to the effective date of the Act would be unjust, the court stated that:

> It could be argued that since the underlying norm of non-discrimination was not new, employers should not be heard complaining

> that the norm has now been given teeth. But many of us would squawk very loudly indeed if people with unpaid parking tickets were made retroactively liable to life imprisonment; and in fact such a change although purely remedial would violate the *ex post facto* clause. *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351(1987); *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 639 (7th Cir. 1990). The amount of care that individuals and firms take to avoid subjecting themselves to liability whether civil or criminal is a function of the severity of the sanction, and when the severity is increased they are entitled to an opportunity to readjust their level of care in light of the new environment created by the change. That is the philosophy behind the *ex post facto* clause but also behind the interpretive principle that presumes that a new civil statute applies only to conduct that occurs after its effective date.

Luddington, 966 F.2d at 229. This language, noted with approval by the court in *Baynes*, indicates that the *Baynes* decision properly should be extended to any case in which the challenged employment conduct occurred prior to the effective date of the 1991 Act.

This view of *Baynes* has in fact been adopted by several panels of the Eleventh Circuit Court of Appeals. *See, Curtis v. Metro Ambulance Service, Inc.*, 982 F.2d 472 (11th Cir.1993). *See also, Goldsmith v. Atmore*, 996 F.2d 1155, 1159 (11th Cir.1993);

Vance v. Southern Bell Tel. & Tel. Co., 983 F.2d 1573 (11th Cir.1993).

Based upon careful examination of the factors discussed above, the undersigned agrees with the Honorable Robert H. Hall, United States District Judge, that "[t]he Civil Rights Act of 1991 was signed by the President and became effective on November 21, 1991. It does not apply to cases arising before the effective date of the Act." *James v. American International Recovery, Inc.*, Civil Action No. 1:89-CV-321-RHH, 57 F.E.P. (BNA) 1226, 1991 WL 281734 (N.D.Ga. December 3, 1991).

Based upon the above, the undersigned Magistrate Judge hereby RECOMMENDS that defendant's motion for summary judgment be GRANTED as it relates to plaintiff's claims under 42 U.S.C. § 1981 and the Civil Rights Act of 1991.

42 U.S.C. § 1983 AND THE FOURTEENTH AMENDMENT

Plaintiff has brought this employment discrimination action against defendant, a private insurance company. Plaintiff has suggested absolutely no state action or involvement in the alleged acts of discrimination. Accordingly, the undersigned Magistrate Judge finds that plaintiff has failed to state a claim either under 42 U.S.C. § 1983 or the Fourteenth Amendment to the United States Constitution as a matter of law. *Sofarelli v. Pinellas County*, 931 F.2d 718, 723 (11th Cir.1991). *See also, Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344, 348 (5th Cir.1975); *Corrente v. St. Joseph's Hospital and Health Center*, 730 F.Supp. 493, 500 (N.D.N.Y.1990). Accordingly, the undersigned Magistrate Judge hereby RECOMMENDS that defendant's motion for summary judgment be GRANTED with regard to these particular claims as well.

Appendix A

In summary, the undersigned Magistrate Judge hereby RECOMMENDS that defendant's motion for summary judgment be GRANTED in its entirety.

IT IS SO REPORTED AND RECOMMENDED, this *2nd* day of March, 1994.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED MAY 24, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8719
Non-Argument Calendar

D. C. Docket No. 1:93-CV-1021-RLV

KENNETH M. PLAISANCE,

Plaintiff-Appellant,

versus

TRAVELERS INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(May 24, 1995)

Before KRAVITCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

Kenneth Plaisance appeals from the district court's grant of summary judgment in favor of Defendant-Appellee Travelers Insurance Company ("Travelers") in Plaisance's *pro se* employment discrimination action.

On appeal, Plaisance claims that: (l) the district court erred by permitting the magistrate judge to hear and determine motions for summary judgment, in violation of 28 U.S.C. § 636 and Article III of the Constitution, and that the district court did not

properly conduct *de novo* review of the magistrate judge's reports and recommendations; (2) Travelers did not answer Plaisance's request for admission of facts within the prescribed time period, which constituted, under Fed. R. Civ. P. 36, a concession to the facts set out in the request, thus entitling him to summary judgment; (3) the district court erred by denying Plaisance's motion to amend his complaint to request a jury trial; (5) the district court misapplied the summary judgment standard; (6) his Title VII retaliation claim should have survived summary judgment; (7) the district court erroneously held that his constructive discharge claim was not sufficiently related to the claims raised in his EEOC charge to merit consideration; and (8) the district court erred by ruling that his case was not actionable under 42 U.S.C. § 1981.

"We review the district court's grant of summary judgment *de novo*, applying the same legal standards used by the district court." *Parks v. City of Warner Robins*, 43 F.3d 609, 612-13 (11th Cir. 1995). "Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. The Court reviewing the motion must consider the evidence in the light most favorable to the nonmoving party." *Jaques v. Kendrick*, 43 F.3d 628, 630 (11th Cir. 1995). See Fed. R. Civ. P. 56(c) (summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law").

After *de novo* review of the record in this case and full consideration of the legal arguments presented by the parties, we conclude that summary judgment was properly granted in favor of Travelers. Accordingly, we AFFIRM.

APPENDIX C — 28 U.S.C. § 636

§ 636. Jurisdiction, powers, and temporary assignment

* * *

(b)(1) Notwithstanding any provision of law to the contrary —

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

Appendix C

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

* * *

APPENDIX D — FEDERAL RULE OF CIVIL PROCEDURE 36

Rule 36. Requests for Admission

(a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Without leave of court or written stipulation, requests for admission may not be served before the time specified in Rule 26(d).

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, subject to Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily

obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(b) Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provision of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

APPENDIX E — FEDERAL RULE OF CIVIL PROCEDURE 56

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the

evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the

application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

APPENDIX F — FEDERAL RULE OF CIVIL PROCEDURE 225

RULE 225
DISCOVERY PRACTICE

225-1. Discovery Period.

(a) Commencement; Length. The discovery period shall commence 30 days after the appearance of the first defendant by answer to the complaint. Discovery proceedings shall be initiated promptly so that discovery may be initiated and completed within the period designated in the discovery track to which the case is assigned, unless the Court has either shortened the time for discovery or has for cause shown extended the time for discovery. Discovery must be initiated sufficiently early in the discovery period to permit the filing of answers and responses thereto within the time limitations of the existing discovery period. See also LR 201-2, Mandatory Interrogatories for All Parties.

The discovery tracks established in this Court are (1) 0-months discovery period; (2) 4-months discovery period; and (3) 8-months discovery period. A chart showing the assignment of cases to a discovery track by filing category is contained in Appendix F.

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APPENDIX G — FEDERAL RULE OF CIVIL PROCEDURE 38

VI. TRIALS

Rule 38. Jury Trial of Right

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) Admiralty and Maritime Claims. These rules shall

not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

(As amended Feb. 28,1966, eff. July 1,1966; Mar. 2,1987, eff. Aug. 1, 1987; Apr. 22,1993, eff. Dec. 1,1993.)

APPENDIX H — 42 U.S.C. § 1981

42 U.S.C. § 1981. Equal Rights Under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

APPENDIX I — 42 U.S.C. § 2000e-2

* * *

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals race, color, religion, sex, or national origin.